HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 12 OF 2004

Sabita Mumtaz Ahemd Shaikh,
Age: 24 years, Presently residing
at: Room No. 27, Ground Floor,
Fakhruddin Manzil, 33/35,
Stable Street, Mumbai. ..Appellant.

Versus.

Mumtaz Ahmed Abdul Salam Shaikh
Adult, R/a: Masaalewali Ki Chawl,
Gouri Pada, Dhobi Talao, Kajurpura,
Bhiwandi, Thane.
Presently residing at
Classic Plaza, Khadak Road,
3rd Floor, Flat No. 305,
Bhiwandi, District Thane. ..Respondent.

Shri. S.M.Sakhardande i/b Smt. S.S.Wagh for the appellant.
Respondent absent, though served.

CORAM: S.B.MHASE &
S.R.SATHE JJ
DATE: SEPTEMBER 15, 2006.

P.C.:

1. Appellant - the original applicant wife in Petition No. C-129 of 2001 has preferred this appeal against the judgment and order passed by the Judge, Family Court No.IV whereby the petition for maintenance filed against the respondent - husband by the wife under the Uncodified Law of Muslim was dismissed. For the sake of convenience hereinafter the parties shall be referred to as the petitioner and respondent.

2. Brief facts giving rise to this appeal are as under:-

2.1. The marriage between the petitioner and the respondent took place on 25.4.1996 at Mumbai according to the Muslim Law. After marriage petitioner started residing with the respondent husband at Room No. 177, Rajabahadur Building, Moulana Azad Road, Mumbai. After few months of marriage, the respondent went to Soudi Arabia for a job. The petitioner therefore started residing in the house of respondent's parents at Bhiwandi. According to the petitioner the respondent's mother and sister were ill-treating the petitioner. She however tolerated the ill-treatment with a hope that the situation will improve on the return of her husband at Mumbai. However, when petitioner's husband returned to Mumbai, he also started ill-treating the petitioner. He and his parents often used to demand money however the petitioner and her parents were unable to fulfil their demands. It is the petitioner's case that the respondent and his mother and sister even assaulted her and as a result of the same she filed police complaint at Bhiwandi police station. The respondent at that stage assured to give good treatment and hence the petitioner started residing with the respondent from January 1998. The petitioner conceived in February 1998 and gave birth to a

female child on 9.11.1998 who was thereafter named Shunehza. In fact during the time when the petitioner was pregnant the respondent had assaulted her and as a result of the same she had started residing with her parents since 25.4.1998. Even after the birth of the female child, for a period of about two years the respondent did not bother about the well being of the petitioner and the minor child.

2.2. It is the petitioner's case that in May 2000 the respondent threatened her to kill and hence she filed a complaint with police on 27.5.2000 for the offence punishable under section 498-A of the Indian Penal Code. However, the petitioner's mother thereafter persuaded the police not to take any action and as such no action was ultimately taken against the respondent.

2.3. According to the petitioner the respondent was having monthly income of about Rs.32,000 from his business and besides this he was getting Rs.1,000/- per month by way of rent. She therefore claimed maintenance of Rs.15,000/- per month for herself and Rs.2,500/- for the minor child.

2.4. The respondent husband filed his Written Statement at Exhibit-8 and admitted the factum of his marriage with the petitioner and the birth of a female child. He however contended that as he had secured a job in Soudi Arabia, for a period of about one and half years he was staying there, but during that period he often used to send money to the petitioner for her maintenance.

2.5. According to the petitioner even during the time when the petitioner used to stay at Bhiwandi in respondent’s parent’s house she often used to go to her parental house without informing the respondent’s parents. The respondent also denied the allegation that the petitioner was subjected to cruelty at the hands of the respondent, his mother and sister. He also denied the allegation that the petitioner had lodged a police complaint. According to him as he was treating the petitioner properly and as such there was no question of giving any assurance as alleged by the petitioner.

2.6. The respondent also contended that he was and is willing to cohabit with the petitioner and to maintain her and minor child. According to

him the petitioner filed a false complaint against him under section 498-A of the IPC but when police were also convinced about the falsity of the complaint they did not take any action against him. The respondent therefore contended that the petitioner in fact harassed him and it only shows that the petitioner had no intention to cohabit or to live together. According to him it was the petitioner who in fact deserted him without any cause.

2.7. The respondent has denied that he was getting income of Rs.32,000/- per month and rent of Rs.1,000/- as alleged by the petitioner. According to him, at the relevant time he was working as a supervisor in a powerloom and was getting only Rs.4,000/- per month. He also contended that when he was in Soudi Arabia he had sent money from time to time to petitioner and out of the said amount the petitioner purchased flat No. 77, 105, Raja Bahadur Building, 2nd floor, Mohd. Ali Road, Mumbai and a shop on rental basis. However the petitioner did not part with possession of the said house and shop. He also contended that when he returned from Soudi Arabia in November 1997 the petitioner refused to stay in the joint family along with

the respondent's parents and asked the respondent to stay with her parents in Mumbai, but as he refused to do so, petitioner started picking up quarrels on flimsy grounds. In February 1998 petitioner's parents came to Bhiwandi at the respondents' house and picked up quarrel with them and then petitioner left her matrimonial home along with her parents. It is his contention that even thereafter he tried to convince the petitioner and to bring her at his house, but she refused to join him and asked him to come and stay with her parents.

2.8. The respondent also contended that as his efforts to bring the petitioner to his house failed, finally he issued notice through advocate to the petitioner and called upon her to return to the matrimonial home. In spite of the receipt of notice the petitioner did not give any reply nor she joined the respondent.

2.9. According to the respondent, the petitioner has let out the shop premises and she is getting monthly income of Rs.5,000/- and the said amount is sufficient for the livelihood of the petitioner and the minor child. According to him, the petitioner has failed to perform her

matrimonial obligations and deprived him of his conjugal rights, she deserted him without any just cause. The respondent therefore contended that the petitioner is not entitled for any maintenance.

3. On these pleadings the learned trial Judge framed issues at Exhibit-18. In order to prove her case the petitioner filed her affidavit of evidence and produced certain documents. The respondent also adduced his evidence. After considering the said evidence and the arguments advanced by both of them, the learned trial Judge came to the conclusion that the respondent has not refused and neglected to maintain the petitioner and that the petitioner has also failed to prove that she was subjected to cruelty at the hands of the respondent. Learned trial Judge also held that without any just cause the petitioner refused to stay with the respondent - husband and as such she is not entitled for maintenance as per the provisions of the Muslim personal law. He therefore dismissed the petition.

4. Being aggrieved by the above mentioned order the petitioner - wife has filed the present appeal. In this appeal before us the learned advocate for the petitioner has urged only two points: firstly, it was submitted that the learned trial Judge has failed to appreciate the evidence

and has wrongly held that the petitioner has failed to prove that the respondent has refused and neglected to maintain her; secondly, it was canvassed that as the petitioner was subjected to cruelty she did not return to her matrimonial home, but it was the duty of the respondent to provide maintenance to his wife and minor daughter. The learned advocate therefore submitted that therefore the appeal be admitted and order for maintenance as prayed be granted.

5. It is not in dispute that the marriage between the petitioner and the respondent took place as per the Mohammedan law on 25.4.1996 and from the said wedlock they have a daughter by name Sueza born on 9.11.1998. It is also not in dispute that after marriage for few days the petitioner stayed with the respondent at Bhiwandi and thereafter the respondent went to Soudi Arabia for a job and he stayed there for a period of about one and half years. It is the case of the petitioner that when she was staying with the respondent's parents at Bhiwandi, they used to ill-treat her. She has narrated certain instances. However, it must be noted that besides the bare interested word of the petitioner there is no evidence in that behalf. It is true that it is always very difficult to have any independent evidence with regard to ill-treatment, which is meeted to a woman at her matrimonial home. However in order to find out as to whether the allegations made by the wife against her husband or in-laws are true or not, one can very

well consider her entire conduct. In the instant case, firstly, it is to be mentioned that the allegations made by the petitioner are too vague. Besides this, if really she would have been assaulted and harassed in the manner as stated by the petitioner, then certainly she could have produced some evidence in the nature of medical certificate or any other evidence. It is worth to note that the petitioner has not even examined her parents in order to show that there was immediate disclosure by her to her parents about the ill-treatment meeted to her. Though she has alleged that she filed a complaint with police the same is not duly proved by her. It is an admitted fact that the police had not taken any action against the respondent in spite of the alleged complaint. It is tried to be suggested that as the respondent assured that he would behave properly, no action was taken against him. There is nothing on record to show that in fact such assurance was given by the respondent to the police. So, we do find that the learned trial Judge has rightly held that there is no sufficient evidence to say that the petitioner was subjected to cruelty or ill-treatment at the hands of the respondent or his mother and sister.

6. From the petitioner’s own evidence it is clear that after February 1998, the petitioner did not return to the matrimonial home. It is her case that the respondent did not provide any money for her maintenance and for the

maintenance of the minor child. However, it is the contention of the respondent that out of the money which he had sent from Soudi Arabia, the petitioner purchased one house and she is residing there. This is not disputed. The respondent also stated that the petitioner has rented out the shop and is getting monthly rent of Rs.5000/- for the same. So, we do find that the petitioner is in fact getting some income for her maintenance and the maintenance of the child. Though it is tried to be suggested that the respondent is having monthly income of Rs. 32,000/- from the business and Rs.1000/- from the rent, the petitioner has not produced any evidence in that behalf. She has in fact stated in her examination in chief that her husband is in the business of powerloom and his monthly income is about Rs.4000/-. So, it is clear that the allegations regarding the income of the respondent are false.

7. The petitioner has specifically filed this petition for maintenance as per the provisions of Mohammedan Law. It is nowhere specifically alleged or even argued that the petitioner is claiming maintenance as per the provisions of Section 125 of the Code of Criminal Procedure, 1973 (for short, "CrPC"). It is worth to see what section 82 of the Mohammedan Law says. It runs as follows:-

> **"Section 82. Wife's right to maintenance under the personal law.-** (1) During the continuance of the marriage - A wife whose marriage is valid (or irregular only on the ground of absence of witnesses) is entitled to maintenance from her

husband (even if she has the means to maintain herself and the husband is necessitous) subject to the following conditions:-

(a) that the wife has attained an age at which she can render conjugal rights to the husband;

(b) that, except for reasonable cause, she is accessible for conjugal intercourse;

(c) that except for reasonable cause she resides with the husband and obeys his reasonable commands provided that if the right to maintenance is suspended owing to the non-fulfilment of any condition, it would revive on the removal of the cause.

8. From the above section it is clear that even as per the Mohammedan Law or Muslim personal law, a wife is certainly entitled for the maintenance if she establishes that for just cause she is residing separately and not with the husband or if she proves that she is not allowing the husband to exercise his conjugal rights for reasonable cause. So, naturally, in the instant case when admittedly the petitioner is residing separately and the marriage between the petitioner and the respondent is still subsisting, we have to find out whether the petitioner has proved that there was justifiable cause for her to reside separately and not to join the company of the respondent. We have already mentioned above that in the instant case the petitioner has failed to prove that she was subjected to cruelty and as a result of the same she was constrained to leave the matrimonial home. In other words, she has failed to show that there was justifiable cause for her to reside

separately. It is pertinent to note that admittedly on 16.2.2001 the respondent - husband had first issued notice to the petitioner - wife calling upon her to come and stay with him at their matrimonial home, but the petitioner even did not give any reply to the said notice, nor she returned to the matrimonial home. On the contrary, straightaway she filed the present petition for maintenance. so, this conduct of the petitioner also goes to show that the respondent was all along ready to cohabit with the petitioner and had even made effort in that behalf and even issued specific notice to that effect. But the petitioner did not give any heed to the respondent's legitimate demand. So, it is clear that the essential conditions for granting maintenance embodied in the Mohammedan law are not fulfilled and as such the petitioner - wife whose marrige with respondent wife is subsisting is not entitled for maintenance as per the said law. So, the learned trial Judge has rightly dismissed the petition. We therefore pass the following order.

O R D E R.

Appeal is dismissed. It is however open for the appellant - wife being a Muslim wife to file an appropriate proceeding for getting maintenance, if permissible in law before the appropriate forum.

(S.R.SATHE,J.) **(S.B.MHASE, J.)**

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